Affirmed and Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00799-CV

ANITA Y. HART, Appellant

V.

TEXAS WORKFORCE COMMISSION and TEXAS WORKERS' COMPENSATION INSURANCE FUND, Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 99-09851

O P I N I O N

Appellant Anita Y. Hart appeals a trial court judgment affirming a Texas Workforce Commission ("TWC") decision that she is ineligible to receive unemployment benefits because her former employer, Texas Workers' Compensation Insurance Fund, terminated her for misconduct. We find substantial evidence supports the TWC decision, and accordingly affirm the trial court's judgment.

Appellant was an employee of Texas Workers' Compensation Insurance Fund from April 1, 1997 through September 2, 1998. According to her supervisors, Hart began

engaging in patterns of disruptive behavior at work, such as escalating minor issues into major issues, sending insubordinate and argumentative written communications to her supervisors, and continuing to argue and dispute issues that had been "closed." Hart was given a written disciplinary warning, which she disputed with the Fund's president. The president agreed that the issues outlined in the written warning were valid and that Hart needed to take corrective measures. A meeting was arranged between Hart, her supervisors, and Human Resources officials to discuss the problems and provide Hart with guidance for correcting the problems. Her behavior apparently did not change, and she was eventually terminated.

Hart applied for unemployment compensation and was initially granted benefits . The Fund appealed the determination and a TWC hearings officer found that Hart's course of conduct constituted misconduct, which disqualified her from benefits. Hart appealed the ruling, but it was affirmed by the TWC Appeal Tribunal. Hart then filed suit in district court for judicial review of the administrative ruling. The district court also affirmed the ruling, holding that substantial evidence supported the TWC's determination. Appellant now appeals from that judgment. She presents four points of error, three of which address complaints against findings of the TWC and one against the trial court's judgment.

Standard of Review

Judicial review of an administrative decision regarding a former employee's right to unemployment benefits requires a trial de novo with a "substantial evidence" review. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986); TEX. LAB. CODE ANN. § 212.202 (Vernon 1996). "Substantial evidence" means that reasonable minds could have reached the same conclusion the agency reached, based on the evidence as a whole. *Texas State Board of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988). The trial court rules on the evidence admitted at the trial de novo, not on the evidence presented at the TWC hearing. *Id.* Reviewing courts are not bound by, nor do they review, the TWC's findings of fact. *Id.*; *Hernandez v. Texas Workforce Commission*, 18 S.W.3d 678, 681 (Tex. App.—

San Antonio 2000, no pet.).

The determination of whether the TWC's decision is supported by substantial evidence is a question of law. *Dozier v. Texas Employment Commission*, 41 S.W.3d 304, 308 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The TWC is the primary fact-finding body, and the reviewing court may not substitute its judgment for that of the agency on controverted issues of fact. *Id*. The reviewing court may only set aside the TWC's decision if the decision was made without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious. *Mercer*, 701 S.W.2d at 831. It is for the reviewing court to decide whether the evidence is such that reasonable minds could not have reached the conclusion the agency must have reached in order to justify its decision. *Hernandez*, 18 S.W.3d at 681. The party seeking to set aside the agency's decision has the burden of proving that it is not supported by substantial evidence. *Mercer* at 831.

TWC's Findings of Fact

In her first three points of error, Hart complains that there is no substantial evidence to support the TWC's findings regarding certain of her alleged actions and behavior. However, as we stated above in our discussion of the standard of review, we do not review the TWC's findings of fact; rather, we look to see whether the agency's decision is supported by substantial evidence. For that reason, we overrule appellant's first, second and third points of error.

Substantial Evidence Review

In her fourth and final point of error, appellant raises lack of substantial evidence to reasonably support the TWC's decision.

Under section 207.044(a) of the Texas Labor Code, a former employee is disqualified from receiving unemployment benefits if the employee was discharged for misconduct. "Misconduct" is defined under section 201.012 of the Labor Code as

> (a) "Misconduct" means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees.

Therefore, to prevail in the district court, it was Hart's burden to prove that no reasonable factfinder could have found that her actions constituted misconduct as defined under the statute.

Under our review of the record, Hart has failed to meet this burden. There is substantial evidence in the record supporting the TWC's decision to deny unemployment benefits. The appellant's first performance review reflected a "below requirement" score in three sections, including reviewing vendor assignments, documenting activities, and cooperation in team work. Her supervisors continued to provide Hart with on-going coaching and to request that she stop sending lengthy e-mails, but apparently her work-related performance did not improve, as she was given a written warning to improve her performance in team work, independent judgment, and cooperation. Eventually the president of the agency became involved, and informed Hart that he agreed her work performance needed to improve. When her performance did not improve, she was terminated for failure to respond appropriately to routine coaching and failure to stop sending contentious e-mails and memoranda. Her supervisors testified that working with Hart to address her continuous complaints and to improve her performance as an employee took significant time from their other employment duties, and caused on-going disruptions at the work place. Appellant's fourth point of error is overruled.

Appellant's Destruction of the Clerk's Record

Although the appellee has not lodged a complaint with this Court, we note that Hart has destroyed the clerk's record in this cause by removing what appears to be pages 96 through 203 from the original record and placing them in her own separately-bound brief labeled "Exhibits." The clerk's record, as with all parts of the appellate record, are and remain the property of the Court, and are not to be altered or destroyed in any way by any

party. Under Rule 12.3 of the Texas Rules of Appellate Procedure, the clerk of this Court is charged with the duty to "safeguard the record and every other item filed in a case." A party may take the record or any part of it from our clerk's office only after the clerk makes reasonable provision to ensure that the withdrawn record or item will be preserved and returned. To this effect, Hart signed a checkout slip from this Court agreeing that she was responsible for returning the records to our clerk's office, including the clerk's record. Implicit within this agreement was that she would preserve the records while they were in her possession prior to their return to the Court.

By taking possession of the clerk's record in this cause from our Court and removing over 100 original pages from it to bind into her own exhibits folder, Hart has permanently destroyed the clerk's record in this case, and has failed to preserve the Court's records in her possession. As briefs filed by the parties are not considered part of the appellate record, these 100-plus pages of the original record are no longer part of the clerk's record. As Hart made clear in her *pro se* brief, she graduated from a Texas law school, interned at the Harris County District Attorney's Office, and practiced law for several years[1]. She is no stranger to the ethics and behavior expected of an attorney. Her destruction of the clerk's record is particularly egregious for that reason.

For these reasons, we strike the appellant's brief labeled "Exhibits," and do not consider on appeal any documents or materials appearing therein. We further order, pursuant to TEX. R. APP. P. 12.3, that Anita Y. Hart file a full and complete replacement copy of the clerk's record in this case, to be requested from and filed by the clerk of the 270th District Court, at Hart's sole cost and expense, within thirty days. We further refer this matter to the Office of the Chief Disciplinary Counsel for the State Bar of Texas for appropriate action.

[1] According to State Bar of Texas public records, Hart's license to practice law in Texas has been suspended for administrative reasons.

The judgment of the trial court is affirmed.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).